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Sanjar Ali Gayrat Ali v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–119–05 OF 2013
MOHAMAD ARIFF, ZAKARIA SAM AND VARGHESE GEORGE JJCA
16 DECEMBER 2014

C *Criminal Procedure — Appeal — Trial judge's findings — Whether trial judge properly evaluated and appreciated all the evidence and made right conclusions on credibility of witnesses — Whether overwhelming evidence supported finding that accused was guilty of the charge — Whether trial judge had not committed any error which warranted appellate intervention — Whether accused's conviction safe*

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The appellant, an Uzbekistan national, was sentenced to death by the High Court for trafficking in 530.6g of methamphetamine in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). According to the prosecution's case, police acting on a tip-off were following a car the appellant
E was driving when he left a hotel when suddenly the appellant accelerated and a chase ensued ending with the appellant swerving into a petrol station and coming to a stop after crashing into several items there. The appellant locked himself in the car and refused demands by the police to open the door. The police had to smash the car's window to forcibly remove the appellant from the
F vehicle. In the commotion, the officer in charge of the ambush party noticed the appellant leaning over the front passenger seat and then throwing out a plastic bag from inside the car. The plastic bag was found to contain the methamphetamine. When his defence to the charge was called at trial, the appellant contended that, contrary to the prosecution witnesses' assertions that
G he was the only one in the car at the time, there was in fact a passenger — a black man named Michael — to whom the plastic bag belonged and that 'Michael' got out of the car and escaped when it crashed at the petrol station. The trial court found the defence's case, especially about the existence of 'Michael', a fiction and an afterthought. The court found the defence's story
H unworthy of belief; that the appellant had actual possession of the drugs and that he failed to rebut the presumption of trafficking under s 37(da)(xvi) of the DDA on balance of probabilities. In the instant appeal against conviction and sentence, the appellant contended that there was a break in the chain of evidence relating to the drug exhibits, that there was doubt as to the identity of
I the drugs because of discrepancies in its weight, that the trial judge did not properly appreciate the defence's case and that the prosecution's witnesses were not credible.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The overwhelming evidence supported the findings of the trial judge. He had properly evaluated all the evidence and there was no failure on his part in appreciating the evidence particularly in the light of the audio-visual advantage he had in assessing the credibility of the prosecution and defence witnesses. There were no errors in the trial judge's decision either at the close of the prosecution's case or at the end of the defence's case which warranted appellate intervention. The appellant's conviction was safe (see paras 3–4).

(2) There was no break in the chain of evidence pertaining to the movement of the seized drugs, its identity or its weight. The issue of the alleged break in the chain of evidence in the handling of the seized drugs and the calling into question of the integrity of the evidence was unconvincing since all three principal prosecution witnesses, SP1 (the government chemist), SP6 (who led the raiding party) and SP8 (the investigating officer), had very carefully explained how they had full custody and control of the drugs at the various material times. The exhibits were all carefully marked, initialed, sealed and identified such that all movements were monitored and controlled (see paras 3 & 22).

(3) The challenge to the identity of the drugs was founded principally on the differences in weight recorded by SP6, SP8 and SP1. The weighing machine used by the chemist, SP1, was calibrated while the ones used by the other two persons were not. That explanation was sufficient to displace the argument that the discrepancies were so material as to cast a doubt on the identity of the drug exhibits (see paras 23 & 26).

(4) SP6 and SP7 both confirmed that only one person, ie the appellant, was in the car at the material time. There were no eyewitnesses who saw 'Michael' running away from the scene. The appellant's witness, SD2, testified that when the appellant came to the hotel room where he was, the appellant was not carrying any plastic bag and that it was SD2 who asked the appellant to send 'Michael' to the KLCC. It had to be noted that if SD2 remained in the hotel room he could not have seen whether 'Michael' had in fact left in the same car with the appellant (see paras 27 & 33).

(5) The court agreed with the trial judge's findings and conclusions that the defence was a fabrication and an afterthought; that the appellant failed to rebut the presumption of trafficking under s 37(da)(xvi) of the DDA on balance of probabilities and that the appellant failed to raise a reasonable doubt on the prosecution's case (see paras 34–35).

[Bahasa Malaysia summary

Perayu, seorang warganegara Uzbekistan, dijatuhi hukuman mati oleh Mahkamah Tinggi kerana mengedar 530.6g methamphetamine bersalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Menurut kes

pendakwaan, polis yang bertindak atas maklumat awam mengikuti kereta yang dipandu oleh perayu telah memandu apabila dia meninggalkan hotel apabila tiba-tiba perayu menekan minyak dan berlaku kejar mengejar berakhir dengan perayu membelok ke stesen minyak dan berhenti selepas melanggar beberapa benda di situ. Perayu mengunci dirinya di dalam kereta dan menolak tuntutan oleh pihak polis untuk membuka pintu. Pihak polis terpaksa memecahkan tingkap kereta secara paksa dan mengeluarkan perayu dari kenderaan. Dalam kekecohan itu, pegawai yang mengetuai pasukan serangan hendap perasan perayu bersandar di tempat duduk penumpang depan dan kemudian membuang beg plastik dari dalam kereta. Beg plastik didapati mengandungi methamphetamine itu. Ketika pembelaannya terhadap pertuduhan dipanggil dalam perbicaraan, perayu berhujah bahawa, bertentangan dengan kenyataan saksi-saksi pendakwaan bahawa dia adalah satu-satunya di dalam kereta pada masa itu, sebenarnya terdapat penumpang — seorang lelaki berkulit hitam bernama Michael — kepada siapa beg plastik itu dimiliki dan bahawa 'Michael' keluar dari kereta dan melarikan diri apabila ia terhempas di stesen petrol. Mahkamah perbicaraan mendapati kes pembelaan, terutama tentang kewujudan 'Michael', sebuah fiksyen dan sesuatu yang difikirkan. Mahkamah mendapati cerita pembelaan tidak layak dipercayai; bahawa perayu mempunyai milikan sebenar dadah dan dia gagal mematahkan anggapan pengedaran di bawah s 37(da)(xvi) ADB atas imbangan kebarangkalian. Dalam rayuan ini terhadap sabitan dan hukuman, perayu berhujah bahawa terputusnya rantaian keterangan yang berhubungan dengan barang kes dadah, bahawa terdapat keraguan tentang identiti dadah kerana perbezaan dalam berat, bahawa hakim perbicaraan tidak betul menilai kes pembelaan dan saksi-saksi pendakwaan tidak boleh dipercayai.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Terdapat keterangan yang mencukupi menyokong dapatan hakim perbicaraan. Dia telah sewajarnya menilai kesemua keterangan dan tiada kegagalan pada pihaknya dalam menilai keterangan terutamanya kelebihan audio-visual yang dipunyainya dalam menilai kredibiliti pendakwaan dan pembelaan saksi. Tiada sebarang kesilapan dalam keputusan hakim perbicaraan sama ada di akhir kes pendakwaan atau di akhir kes pembelaan yang mewajarkan campur tangan rayuan. Sabitan perayu adalah selamat (lihat perenggan 3–4).

(2) Tiada gangguan dalam rantaian bukti yang berkaitan dengan pergerakan dadah yang dirampas, identitinya atau beratnya. Isu gangguan yang dikatakan dalam rantaian keterangan dalam pengendalian dadah yang dirampas dan memanggil kepada persoalan integriti bukti itu tidak meyakinkan kerana ketiga-tiga saksi utama pendakwaan, SP1 (ahli kimia kerajaan), SP6 (yang mengetuai pasukan serang hendap) dan SP8 (pegawai penyiasat), telah dengan berhati-hati menjelaskan bagaimana mereka mempunyai jagaan dan kawalan dadah pada masa yang material.

Bahan ekshibit semuanya dengan teliti ditandakan, ditanda tangan, dimeteraikan dan dikenal pasti yang sedemikian semua pergerakan dipantau dan dikawal (lihat perenggan 3 & 22).

(3) Cabaran kepada identiti dadah ditubuhkan terutamanya pada perbezaan dalam berat yang dicatatkan oleh SP6, SP8 dan SP1. Mesin berat yang digunakan oleh ahli kimia, SP1, telah ditentukur manakala yang digunakan oleh kedua-dua orang lain tidak. Penjelasan yang mencukupi untuk menggantikan hujah bahawa perbezaan begitu ketara sehingga menimbulkan keraguan mengenai identiti dadah yang diekshibitkan (lihat perenggan 23 & 26).

(4) SP6 dan SP7 kedua-duanya mengesahkan hanya satu orang, iaitu perayu, adalah di dalam kereta pada masa yang material. Tiada saksi mata yang melihat 'Michael' melarikan diri dari tempat kejadian. Saksi perayu, SD2, memberi keterangan bahawa apabila perayu datang ke bilik hotelnya, perayu tidak membawa apa-apa beg plastik dan bahawa ia adalah SD2 yang meminta perayu untuk menghantar 'Michael' kepada KLCC. Ia perlu diambil perhatian bahawa jika SD2 kekal di dalam bilik hotel dia tidak dapat melihat sama ada 'Michael' sebenarnya telah pergi di dalam kereta yang sama dengan perayu (lihat perenggan 27 & 33).

(5) Mahkamah bersetuju dengan dapatan hakim perbicaraan dan kesimpulan bahawa pembelaan adalah fabrikasi dan sesuatu yang difikirkan semula; bahawa perayu gagal mematahkan anggapan pengedaran di bawah s 37(da)(xvi) ADB atas imbangan kebarangkalian dan bahawa perayu gagal menimbulkan keraguan munasabah terhadap kes pendakwaan (lihat perenggan 34–35).]

Notes

For cases on trial judge's findings, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 937–940.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636, FC (refd)
Lew Wai Loon v PP [2014] 3 MLJ 325; [2014] 2 CLJ 649, FC (refd)
Loh Kah Loon v PP [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ 311, SC (refd)
Mohamed Yatin bin Abu Bakar v PP [1950] 1 MLJ 57 (refd)
Yeong Kia Heng lwn Pendakwa Raya [1992] 1 MLJ 327; [1992] 1 CLJ 364, SC (refd)
Yusri bin Pialmi v PP [2011] 4 MLJ 533, FC (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348, FC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 182A
Dangerous Drugs Act 1952 ss 37(da)(xvi), 39B(1)(a), 39B(2), Schedule 1

Appeal from: Criminal Trial No 45(A)-57-10 of 2011 (High Court, Kuala Lumpur)

V Jayamurugan (Jayamurugan Vadivelu & Partners) for the appellant.
Tetralina bt Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohamad Ariff JCA:

THE CHARGE, CONVICTION AND SENTENCE

[1] The appellant, a national of Uzbekistan, was charged and convicted of trafficking in dangerous drugs (530.6g of methamphetamine) in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the DDA, and was sentenced to death accordingly.

[2] The charge against the appellant was as follows:

> Bahawa kamu pada 1 Jun 2011 jam lebih kurang 1.00 pagi di kawasan Stesen Minyak Caltex, Jalan Sultan Ismail, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu methamphetamine, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE APPEAL AND OUR DECISION IN THE APPEAL

[3] The appellant appealed against both the conviction and sentence. We dismissed the appeal. In summary, we found the overwhelming evidence before the trial court supported the findings of the learned trial judge. The trial judge had also properly evaluated the evidence in his detailed judgment, and we could find no failure on his part in the appreciation of the evidence, particularly in light of the audio-visual advantage possessed by His Lordship in assessing the credibility of the prosecution and defence witnesses. Although counsel for the appellant vigorously advanced it before us, we could not find any break in the chain of evidence pertaining to the movement of the seized drugs, its identity or its weight.

[4] We were therefore not persuaded that there were errors for appellate intervention in the judge's decision at the close of the prosecution case and the finding that there was a prima facie case for the appellant to answer, as well as

at the close of the defence case and His Lordship finding that the charge against the appellant had been proven beyond reasonable doubt. In our opinion, the conviction was safe, and thus both conviction and sentence were affirmed.

[5] In this appeal, counsel for the appellant raised four grounds related to the following:

(a) break in the chain of evidence;

(b) identity of the exhibits;

(c) failure in judicial appreciation of the defence case; and

(d) credibility of the prosecution witnesses.

[6] These grounds will be discussed at appropriate junctures in our judgment below, starting with a consideration of the learned judge's decision at the close of the prosecution case.

THE PROSECUTION'S CASE

[7] The material facts pertaining to the prosecution's case have been set-out in sufficient detail in the judgment of the High Court. It is not necessary to repeat them save to summarise some key elements to underline why we decided the High Court was correct in finding there was a prima facie case for the appellant to answer at the close of the case for the prosecution.

[8] Acting on information received on drug trafficking, the police had conducted a surveillance in the area of the Shangri La Hotel along Jalan Sultan Sulaiman, Kuala Lumpur just past midnight (about 12.30am) on 1 June 2011. Six police personnel comprising two teams were involved in the surveillance in two unmarked cars. 'SP6' (Inspector Samsul bin Musa) was the raiding officer in charge, together with one other police personnel, L/Kpl Mahyudi bin Mokhtar, was in a Gen-2 No WMK 6904. The others were in a Proton Waja No WJT 263. The Gen-2 was parked nearby a bus stop just outside the said hotel, while the Waja was parked along Jalan Sultan Sulaiman near the exit from the hotel. 'SP7' (Kpl Bahar bin Sukarman) lead the team who were in the Waja.

[9] Around 1am, the surveillance party sighted the appellant, who was driving a Honda Civic No WLB 701, exiting slowly from the hotel into Jalan Sultan Ismail. The Honda passed by the Gen-2. The two police vehicles followed the Honda. The Honda driven by the appellant suddenly accelerated. It was the case for the prosecution that the appellant suddenly accelerated when he realised he was being tailed.

[10] Because the traffic was heavy at the traffic light intersection between Jalan Sultan Ismail and Jalan Ampang, the Honda swerved into the Caltex Station nearby, entering it through the exit route. The Honda then crashed against several traffic cones emplaced there, hit a Waja car belonging to a member of the public and crashed against a metal rod bearing a 'No Parking' sign.

[11] The two police vehicles entered the Caltex Station in pursuit and blocked the path of the Honda. At his juncture, the appellant was seen leaning his body towards the front passenger seat and then throwing out a plastic bag from the car.

[12] SP6 approached the driver's side of the Honda to arrest the appellant, but the appellant locked himself in. SP6 then had to use a metal rod to smash the window on the driver's side and the appellant had to be forcibly removed from the car and arrested. In his examination-in-chief, SP6 described the incident thus:

> Saya ketuk tingkap bahagian pemandu kereta dan kenalkan diri sebagai polis beberapa kali. Saya ketuk dan jerit 'polis, polis, polis'. Saya cuba membuka pintu tetapi pintu kereta berkunci. Masa itu saya nampak seorang saja duduk di bahagian pemandu. Tiada orang lain dalam kereta suspek. Kemudian saya ambil satu objek besi bertanda 'No Parking' dan saya telah mengetuk cermin hadapan kereta suspek. Akibatnya cermin kereta suspek pecah tetapi kaca cermin masih terlekat di bingkainya.
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> Tindakan susulan saya telah bergerak ke pintu pemandu. Saya memecahkan cermin kereta sebelah pemandu. Ketika saya berusaha untuk pecahkan cermin pemandu, saya lihat suspek buka pintu penumpang hadapan dan mengambil sesuatu beg di tempat letak kaki penumpang hadapan dan mencampakkannya keluar. Kemudian saya terus jalankan tangkapan ke atas suspek kerana ketika itu cermin telah pecah dan saya masukkan tangan serta badan melalui tingkap telah berjaya menangkap suspek dengan dibantu oleh L/Kpl Hasbudillah. Masa itu suspek cuba untuk larikan diri melalui pintu hadapan penumpang yang telah terbuka tetapi gagal sebab tubuhnya terikat dengan tali pinggang keledar ... (see p 30 of Vol 1 of the appeal record).

[13] The white plastic bag that was thrown out of the vehicle was retrieved by Kpl Bahar, and given to SP6. Inside the bag was a white transparent plastic packet ('peket plastic lutsinar') containing pieces of a clear substance ('ketulan-ketulan jernih'). Some of the substance had spilt just outside the vehicle (about one foot from the door). Upon being shown by Kpl Bahar, SP6 collected the remaining pieces and placed them back inside the transparent packet. The plastic packet was of the type that could be easily opened at the top. The appellant was searched but there were no documents or other substances found on his person.

[14] All in all, the raid at the Caltex Station took about two hours. The appellant was then taken to IPK, Kuala Lumpur and further interrogated. SP6 prepared his arrest report and search list. SP6 in his evidence confirmed that the white plastic bag containing the white transparent packet containing the clear substance (suspected to be 'syabu') was kept within his sole custody and control throughout this duration until he handed them over at about 11am on 1 June 2011 to the investigation officer, Insp Nor Rafidah bt Mustapah ('SP8'). SP6 has also marked the exhibits as 'A' and 'A1' and placed his initials on them by using a black marker pen. SP6 had also weighed the plastic bag together with the plastic packet containing the clear substance at IPK using the weighing machine supplied by JSJN IPK. The gross weight was 711g.

[15] SP8 ('the IO') confirmed receiving the exhibits together with the search list and the handover form ('Borang Serah Menyerah') at 11am on 1 June 2011. SP8 identified the exhibits marked in black ink by SP6 as 'A' and 'A1'. She placed her own initials together with the date (1 June 2011) on the exhibits using a red marker pen. Both exhibits marked as P10 appear on p 6 of Vol 2 of the appeal record. She then kept the exhibits in a locked safe in her office ('peti besi berkunci dalam pejabat saya'). She was positive that these exhibits were not mixed with other exhibits, and no one else had access to them except herself. The exhibits were also weighed by her using her own weighing machine that she admitted had never been calibrated. She came up with a weight of 696g.

[16] These exhibits were taken out briefly on 2 June 2011 by her to be photographed and locked up again until 3 June 2011 when they were sent to the Chemistry Department for analysis and received back by her on 29 September 2011 from the Chemistry Department.

[17] SP8 described the flow of sequence in detail. We reproduce below that part of her testimony during examination-in-chief:

> Saya telah balik ke pejabat dan buka peti besi untuk hantar barang kes ke JKM. Saya masukkan barang kes ke dalam sampul surat, ditanda 'N' dan juga ditulis nombor report dan nombor IP. Saya tulis juga nama saya. Sampul itu saya sealkan dengan 'PDRM 422'. Sampul itu saya boleh camkan ...
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> Selepas seal saya hantar sampul ke JKM Petaling Jaya. Saya jumpa ahli kimia En Zulkfeli. Saya telah serahkan P5 kepada beliau. Beliau serahkan resit kimia kepada saya dengan nombor (PJ) FOR7167/11-0. Diserahkan pada jam 11.01 pagi 3.6.2011 ...
>
> Saya terima balik barang kes pada 29.9.2011. Tidak ingat jam berapa. Saya terima sendiri daripada Encik Zulkfeli. Saya terima juga sesalinan laporan kimia dan sampul surat. Keadaan berseal dengan JKM ... (see pp 133–134 of the appeal record, Vol 1).

[18] Her evidence on the movement of the exhibits from her to JKM was corroborated by the evidence of 'SP1' (the government chemist, Zulkfeli bin Mohd Edin). SP1 weighed the crystalline substance in the transparent plastic packet ('A1') which showed a net weight of the substance as 693.7g. After tests conducted, SP1 isolated the methamphetamine, and determined the net weight of the methamphetamine as 530.6g.

[19] The prosecution also adduced evidence on how the Honda was borrowed by the appellant from a friend of his, Azrin Shah bin Mohd Sani ('SP5'), who had earlier rented the car from 'SP4'. Both SP4 and SP5 confirmed that when rented, and when the car was subsequently lent to the appellant, there was no plastic bag in the Honda car. This was what SP5 said:

> Saya serahkan kereta Honda Civic warna putih yang saya pinjam daripada BM Holidays & Tours Sdn Bhd kepada OKT. Masa serahkan kepada OKT saya tidak tinggalkan apa-apa barang dalam kereta. Malam itu saya pinjam dan pagi itu OKT terus pinjam (p 93, appeal record, Vol 1).

[20] In the submissions before the High Court, counsel for the appellant had raised four grounds in the attempt to argue that the prosecution had failed to establish a prima facie case at the close of the prosecution case. Three of the grounds were also raised in this appeal, except for the fourth ground which was grounded on the argument that the police investigation was weak and failed to address issues pertaining to fingerprint evidence from the exhibits, failure to seize and investigate the other items found in the car (a reference to two tins of canned drinks found in the car), failure to investigate the incident of the Waja car belonging to a member of the public that collided with the Honda Civic, CCTV recording at the Caltex Station, and the presence of an alleged Negro male who was argued to be in the Honda Civic together with the appellant at the time of the surveillance and at the outset of the raid. The first three grounds related to (a) the break in the chain of evidence in relation to the exhibits; (b) the doubt surrounding the identity of the exhibits and the probability that they could have been tampered with; and (c) the credibility of the prosecution witnesses in view of alleged conflicting testimony.

[21] All four grounds did not find favour with the High Court. The High Court found that the prosecution had established all three main ingredients of the charge, ie (a) the drugs found were dangerous drugs under the Act (methamphetamine, which is a prescribed drug under Schedule 1 of the Act; (b) that the appellant had actual and direct possession of the drugs with the requisite mens rea; and (c) the seized drugs weighed 530.6g which exceeded the minimum limit of 50g under the Act to trigger the presumption that the drugs were in the appellant's possession for the purposes of trafficking. On the evidence before the High Court, we agreed with the finding. There was no real issue on whether the learned trial judge had conducted a maximum evaluation

of the evidence, or whether His Lordship had not applied the correct test at the close of the case for the prosecution. In our opinion, he very clearly did, consistent with the statutory requirements under s 180 of the Criminal Procedure Code. On the evidence as assessed by the High Court, it was clear at the close of the prosecution case that the prosecution had established sufficient 'credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.' The learned trial judge had referred in particular to *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, and the statement that a court must undertake a positive evaluation of the credibility and reliability of the unrebutted evidence at the close of the prosecution's case. We were satisfied that the High Court did so.

[22] The issue of the alleged break in the chain of evidence in the handling of the seized drugs as exhibits and calling into question the integrity of the evidence was unconvincing since all three principal witnesses SP1, SP6 and SP8 had very carefully explained how they had full custody and control of the drugs at the various material times. The exhibits were all carefully marked, initialed, sealed and identified such that all movements were monitored and controlled. We have referred to the relevant testimony earlier above.

[23] As for the challenge on the identity of the drugs, this ground was founded principally on the differences in the weight recorded by SP6, SP8 and SP1. In the High Court as well as in the submissions before us in this appeal, the defence relied on the decision of the Federal Court in *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348, for the principle that discrepancies in relation to the weight of the seized drugs creates a reasonable doubt and goes to the question of the identity of the drugs, if left unexplained. *Zaiful bin Muhammad*, followed the earlier decision in *Yeong Kia Heng lwn Pendakwa Raya* [1992] 1 MLJ 327; [1992] 1 CLJ 364. In *Zaifull bin Muhammad*, the Federal Court also referred to the earlier case of *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345, but appeared not to have followed it. We note the passage at para [37] in *Zaifull bin Muhammad*:

> Our attention was drawn to the case of *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345 where the Federal Court held that even though there existed a discrepancy in the weight of the drug exhibit as found by the police and the chemist, the High Court found as a fact that there was no doubt in the identity of the exhibit because the evidence before the court showed that there was no break in the chain of evidence. Having considered these three previous decisions, we agree with the reasoning in *Yeong Kia Heng lwn Pendakwa Raya* ... and *Tan Yew Choy v Public Prosecutor* ... In our view, it is a contradiction in terms, to say that there is no break in the chain of evidence, when in fact there exists material discrepancy as to the weight of the drug exhibit. In any event, in the present case the discrepancies are not only as regard to the gross weight but also as to the number of 'ketulan'. In our view, these are material discrepancies that go to the issue of identity of the drug exhibit.

[24] See also *Yusri bin Pialmi v Public Prosecutor* [2011] 4 MLJ 533, another Federal Court decision, which carries a similar analysis.

[25] Despite the wide principle established, although some concession is made to the special facts of the case, we believe the subsequent Federal Court decisions in *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636 and *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325; [2014] 2 CLJ 649 are more to the mark in terms of a persuasive and working principle. The lucid judgment of the Federal Court in *Lew Wai Loon*, has now laid down the principle that discrepancies in weight alone of an exhibit should not ipso facto cast doubt on its identity. To quote the pertinent parts of the judgment delivered by Richard Malanjum CJ Sabah and Sarawak (at paras 25–27):

> ... it is essential to appreciate that an exhibit, perceivable by the senses and as distinguished from testimony, is part and parcel of evidence adduced during a trial ... It is real evidence as opposed to demonstrative or testimonial evidence. And evidence is the means by which a fact in issue is proved ... Further, before an exhibit is admitted into evidence the foundation for its admission must be established. Such foundation may be in the form of a fact or event that occurred and providing the reliability and trustworthiness of the exhibit as a piece of evidence ...
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> In other words, an exhibit, in a criminal or a civil trial, is physical or documentary evidence brought before the court. Its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant not only for its admission as a piece of evidence but that such facts and/or events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. It short, it is a fact sensitive exercise.
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> Accordingly, in the present case, we would say that discrepancies in weight alone of an exhibit such as drug should not ipso facto cast doubt on its identity. There are other primary factors to consider such as the facts and/or events that form the foundation for its admission as a piece of evidence. One fact and/or event to consider is whether there is any break in the handling or custody ...

[26] Thus, on the facts of this present appeal, it was fundamental to determine whether there was any break in the handling and custody of the drugs. Was there a gap in the chain of evidence? In our considered opinion, there was no such gap and no reasonable doubt could be attributed to the differences in weight of the drugs. The weighing machine used by the chemist (SP1) was calibrated. The other two were not. That explanation was, to our mind, sufficient to displace the argument that the discrepancies were so material as to cast a doubt on the identity of the drugs exhibit.

[27] During the cross-examination of SP6 and SP8, counsel for the appellant had questioned them on the delay between the time the drugs were seized and the time when SP6 brought them to IPK, Kuala Lumpur and when they were handed over to SP8 as the IO. SP6 and SP7 were also challenged on the alleged presence of a Negro male in the Honda Civic as a passenger. It was put to them

that the delay of two hours at the Caltex Station resulted from the attempt of the raiding party to locate this Negro male who had apparently fled from the car when the Honda Civic was blocked by the Gen-2 and the Waja. It was suggested to the witnesses that the white plastic bag belonged to this person, not the appellant. SP6 and SP7 both confirmed positively that only one person was seen in the Honda Civic, and that was the appellant. There were no eyewitnesses who saw the alleged Negro male running away from the scene. The witnesses were also questioned in cross-examination on the presence of the two tins of canned drinks to suggest that there were in fact two persons in the car. Counsel for the appellant also submitted that the versions of the evidence given by SP6, SP7 and SP8 on how the plastic bag was thrown from the car, differed. SP6 and SP7 had explained that the plastic bag was thrown out of the open front door, while SP8 testified that it was thrown out through the car window. This was an attempt to cast a doubt on the reliability of the evidence given by SP6, SP7 and SP8. It was even suggested by the defence to the witnesses that it was not possible for any driver strapped to a seat-belt to bend sideways towards the passenger seat to retrieve the plastic bag from the foot of the passenger compartment and then to have thrown it out.

[28] Further, the difference between the contents of the search list ('Senarai Pemeriksaan' (P16) and the 'Borang Serah Menyerah' (P17)), where no mention was made of the transparent plastic packet in P16, unlike P17, was argued by the defence as again casting a doubt on the veracity of the prosecution evidence.

[29] The learned High Court judge was not persuaded that these suggestions in the cross-examination of the prosecution witnesses succeeded in casting a doubt in the prosecution's case. His Lordship found the questions raised in relation to the Negro male were pure speculations without any shred of evidence, stating:

> Peguambela juga berhujah tidak munasabah pengedar dadah akan meletakkan bungkusan dadah di tempat letak kaki di bahagian penumpang hadapan. Oleh itu dihujahkan kemungkinan benar syor pembelaan bahawa pada masa kejadian terdapat seorang lelaki Negro yang duduk di bahagian penumpang hadapan yang telah membuang barang kes dadah dan telah berjaya melarikan diri. Fakta pasukan serbuan berada satu setengah jam di tempat kejadian menunjukkan kemungkinan pihak polis cuba menangkap lelaki negro tersebut. Apa yang dihujahkan oleh peguambela hanyalah satu spekulasi beliau tanpa berlandaskan kepada walau secebis keterangan menunjukkan kehadiran lelaki Negro tersebut ... (at para [25] of the judgment).

[30] The alleged failure to properly conduct the investigation, the differences in the testimonies of SP6, SP7 and SP8 and the differences between the contents of P16 and P17 were also found by the learned judge insufficient to cast a doubt on the veracity of the prosecution evidence, stating:

Mahkamah ini memutuskan bahawa sekiranya ada percanggahan tersebut tentang cara mana barang kes dicampakkan oleh tertuduh, percanggahan tersebut tidaklah material sehingga boleh menimbulkan keraguan dan gap dalam kes pendakwaan (at para [24]).

...

Segala syor peguambela tidak dipersetujui oleh saksi-saksi pendakwaan malahan saksi-saksi telah menjelaskan mengapa mereka mengambil masa agak lama di tempat kejadian selepas rampasan dilakukan. Saksi-saksi pendakwaan juga menyatakan hanya melihat tertuduh seorang diri di dalam kereta Honda tersebut. Tiada apa-apa alasan untuk Mahkamah ini mengesyaki dan menolak keterangan yang diberikan oleh saksi-saksi pihak pendakwaan dalam kes ini. Tiada alasan untuk mereka berkata tidak benar di Mahkamah ini hanya untuk 'mengenakan' tertuduh.

[31] On the differences between P16 and P17, the learned judge was satisfied with the explanation given by SP6 that it was an oversight on his part, and the differences were not fatal to the prosecution's case in light of the very strong oral evidence on the recovery and handling of the drugs.

THE DEFENCE EVIDENCE

[32] The appellant elected to take the stand and gave evidence on oath ('SD1'). The only other witness called was a Palestinian named Muhammad Majeed Musalam ('SD2'), a friend of the appellant. The appellant's evidence centred on an alleged meeting between himself and four other persons in a room in Shangri-La Hotel. According to the appellant, he received a telephone call from his friend (SD2) to meet him in Shangri-La Hotel with some other persons to discuss the purchase of leather goods. The appellant was doing some business in leather goods. The call was allegedly received around 11am on 25 May 2011. He arrived at the hotel around 11.30am. SD2 was in the room together with two Malay men ('Lan' and 'Hayat') and an African man called 'Michael' from Nigeria. After discussing for about 10–15 minutes, the appellant left the room together with 'Michael'. SD2 had requested the appellant to send 'Michael' to KLCC, to which he agreed. The appellant testified that he saw 'Michael' holding a backpack, a white plastic bag and a can of 'Redbull' drink. Before leaving, the appellant too took a canned drink from the refrigerator in the room. 'Michael' was with him in the car. He stopped at the Caltex Station to fill petrol, and at that juncture his car was blocked by the Waja and the Gen-2. In fact, it was his evidence that the Gen-2 then collided with the Honda he was driving. 'Michael' then told him to accelerate. The other two vehicles blocked the car. 'Michael' then ran out of the car. The appellant was arrested and taken back to the room in Shangri-La Hotel where the police also arrested SD2 and the two Malay men. They were then driven to Holiday Villa in Jalan Ampang where the police allegedly raided another room and arrested two females and one 'tomboy'. One female and the 'tomboy' were from the Philippines, the other female from Uzbekistan. The police also

allegedly seized five plastic packets containing drugs there. The appellant denied that the white plastic bag containing the transparent plastic packet with the drugs belonged to him. This was a clear attempt to link 'Michael' with the drugs.

[33] SD2 attempted to corroborate the presence of 'Michael' in the room and testified that it was SD2 who asked the appellant to send 'Michael' to KLCC. SD2 also testified that when the appellant came to the hotel room, he was not carrying any plastic bag. It need to be noted that SD2 continued to remain in the hotel room and could not have seen whether 'Michael' had indeed travelled with the accused in the Honda Civic.

[34] The learned judge found the defence evidence to be a fabrication and an afterthought. His Lordship concluded that the appellant had not succeeded in rebutting the presumption of trafficking under s 37(da)(xvi) of the DDA on a balance of probabilities, nor had the appellant succeeded in ultimately raising a reasonable doubt in the prosecution case at the close of the defence case consistent with the statutory requirements under s 182A of the CPC.

[35] We agreed with the learned judge's findings and conclusions, and further found the court had correctly and carefully applied the law. The court was correctly referred to and applied the principles as laid down in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ 311 and *Mohamed Yatin bin Abu Bakar v Public Prosecutor* [1950] 1 MLJ 57, which were the cases referred to by the learned judge in this connection. Contrary to the arguments by the defence, we found the learned judge had correctly and judicially appreciated the evidence, including the defence evidence, and reached a correct decision on the facts and the law. We were in full agreement with the findings as summarised in paras [35] and [36] of the judgment, which we quote below:

> [35] Saya mendapati pembelaan tertuduh hanyalah rekaan semata-mata dan hanyalah satu pemikiran terkemudian. Cerita tertuduh mengenai insiden di Hotel Shangri-La tidak pernah disyorkan kepada saksi-saksi pendakwaan selain cadangan tentang lelaki Negro yang melarikan diri dari kereta Honda. Pembelaan tertuduh mengenai kewujudan lelaki Negro dalam kereta Honda sebelum beliau ditangkap tidak dapat diterima kerana ia hanyalah rekaan semata-mata. Jika benar keterangan SD2 tentang kewujudan Micheal di Hotel Shangri-La namun SD2 tidak dapat mengesahkan Micheal telah sebenarnya menaiki kereta tertuduh pada malam itu. Lagi pun tertuduh hanya dilihat oleh saksi-saksi pendakwaan berada seorang diri di dalam kereta Honda tersebut.
>
> [36] Setelah membuat penelitian maksimum keseluruhan keterangan, saya mendapati keterangan pihak pembelaan tidak boleh dipercayai dan tidak dapat diterima serta telah gagal untuk menimbulkan sebarang keraguan yang munasabah terhadap kebenaran kes pihak pendakwaan. Saya mendapati tertuduh mempunyai milikan sebenar dadah yang menjadi hal perkara dalam pertuduhan. Tertuduh juga

A mempunyai pengetahuan salah terhadap barang kes dadah tersebut apabila bertindak mencampakkan bungkusan plastik berisi dadah tersebut keluar dari kereta Honda yang beliau pandu. Saya juga mendapati pihak pembelaan telah gagal untuk mematahkan anggapan pengedaran dibawah s 37(da)(xvi) ADB 1952 yang terpakai terhadap tertuduh dalam kes ini atas imbangan kebarangkalian. Atas keseluruhan keterangan yang berada dihadapan mahkamah, saya mendapati pihak pendakwaan telah berjaya membuktikan pertuduhan terhadap tertuduh melampaui sebarang keraguan yang munasabah.

B

CONCLUSION

C

[36] As outlined at the outset of our judgment, and for the reasons analysed above, we therefore dismissed the appeal and affirmed the conviction and sentence of the High Court.

D *Appeal dismissed and the conviction and sentence affirmed.*

Reported by Ashok Kumar

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